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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 PK FENSKE-BUCHANAN,

11 Plaintiff,

12 v.

13 BANK OF AMERICA N.A.,

14 Defendant.

CASE NO. C11-1656 MJP

ORDER ON MOTIONS,  
DISCOVERY AND SCHEDULING

15  
16 The Court, having received and reviewed:

- 17 1. Plaintiff's Motion to Compel (Dkt. No. 41), Defendants' Response (Dkt. No. 44), and  
18 Plaintiff's Reply (Dkt. No. 48);
- 19 2. Defendants' Supplemental Statement (Dkt. No 55); Plaintiff's Motion to Strike (Dkt.  
20 No. 60), and Defendants' Opposition to Motion to Strike (Dkt. No. 61);
- 21 3. Plaintiff's Motion for Sanctions (Dkt. No. 51), Defendants' Opposition (Dkt. No. 66),  
22 Plaintiff's Reply (Dkt. No. 69), and Defendants' Surreply (Dkt. No. 71);
- 23 4. Plaintiff's Motion for Extension of Time to Complete Discovery (Dkt. No. 58),  
24 Defendants' Opposition (Dkt. No. 62) and Plaintiff's Reply (Dkt. No. 65);

1           5. Plaintiff's Motion for Reconsideration (Dkt. No. 64) and Defendants' Response to  
2           Motion for Reconsideration (Dkt. No. 85).

3 and all attached declarations and exhibits, makes the following rulings:

4           IT IS ORDERED that Plaintiff's Motion to Compel is GRANTED IN PART and  
5 DENIED IN PART.

6           IT IS FURTHER ORDERED that Plaintiff's Motion to Strike is DENIED.

7           IT IS FURTHER ORDERED that Plaintiff's Motion for Sanctions is DENIED.

8           IT IS FURTHER ORDERED that Plaintiff's Motion for Extension of Time to Complete  
9 Discovery is GRANTED.

10          IT IS FURTHER ORDERED that the parties will meet and confer and present to the  
11 Court a proposed case schedule with new deadlines for discovery and dispositive motions and a  
12 proposed new trial date by no later than **June 21, 2012**.

13          IT IS FURTHER ORDERED that Plaintiff's motion for reconsideration of the dismissal  
14 of the Consumer Protection Act claim is GRANTED; the claim alleging a violation of the  
15 Washington Consumer Protection Act is reinstated.

16 **Background**

17          This is a multi-count complaint against Defendants Bank of America , N.A. (BANA) and  
18 BAC Home Loans Servicing, L.P. (BACHLS) by Plaintiff, a mortgagee who claims in essence  
19 that her prepayments of principal were systematically misapplied and that Defendants retaliated  
20 against her when she complained. The Court will not attempt to summarize the lengthy and  
21 complex factual setting in which these claims arise; such facts as are necessary to explain the  
22 rulings on the various motions at issue will be included in the relevant sections.

23          The motions at issue are primarily concerned with issues which have arisen during the  
24 discovery process, as well as a motion for reconsideration arising out of the Court's ruling on an

1 earlier motion to dismiss. On June 14, 2012, the Court held a status/scheduling conference with  
2 the parties at which the discovery issues were discussed and (hopefully) resolved – the results of  
3 that conference will be reflected in this order.

#### 4 **Discussion/Analysis**

##### 5 **Motion to Compel**

6 Following the status/scheduling conference, the parties agreed that the following  
7 information either has been provided or will be provided following a further meet and confer:

- 8 1. The names of all of Defendants' employees who touched Plaintiff's file for the period  
9 between her first request for application of a principal prepayment and a time to be  
10 determined by the parties.
- 11 2. The organization charts for the departments who employed the people identified in #1.
- 12 3. All communications between the people identified in #1 concerning Plaintiff's file.
- 13 4. Copies of the policies and procedures by which the decisions by people identified in #1  
14 affecting Plaintiff's loan were made.

15 Additionally, defense counsel has agreed to sit down with Plaintiff's attorney, go through  
16 the collection of undifferentiated documents which were provided in response to Plaintiff's  
17 discovery requests and identify which documents were provided in response to which specific  
18 discovery request.

19 Several of Plaintiff's disputed discovery requests involve interrogatories or requests for  
20 production (RFPs) for records on events or practices which affected loan recipients throughout  
21 Defendants' customer base. Defendants have responded to these requests by labeling them  
22 "overbroad" and "unduly burdensome." The Court has encouraged counsel for both sides to  
23 confer with each other to narrow the requests down to information which is relevant to Plaintiff's  
24 claims and to confer with Defendants' IT department to identify databases and search terms

1 which can produce the information which is useful to Plaintiff without being wasteful of  
2 Defendants' time and resources.

3 The parties also have what appears to be a minor dispute centering on the impact of the  
4 Gramm-Leach-Bliley Act (GLBA), which prohibits financial institutions from disclosing  
5 "nonpublic personal information" to nonaffiliated third parties without notice to their customers.  
6 15 U.S.C.A. § 6801(a). There does not seem to be any real disagreement that Plaintiff's  
7 discovery requests fall under an exemption to GLBA where the disclosure is necessary to  
8 "respond to judicial process" (15 U.S.C.A. § 6802(e)(8)). To the extent that Defendants believe  
9 that a court order is required to trigger their obligation to disclose, they may consider this ruling  
10 to constitute that court order. Defendants are also ordered to reveal to Plaintiff forthwith  
11 whether they are withholding any documents under a claim of GLBA immunity; if not, they shall  
12 state so definitively.

13  
14 Defendant's "Supplemental Statement"/Plaintiff's Motion to Strike

15 Following the ruling on their motion to dismiss, Defendants filed a "supplemental  
16 statement" concerning Plaintiff's motion to compel which argued that, in the wake of the  
17 dismissal of the Plaintiff's Consumer Protection Act (CPA) claims, any discovery request of  
18 Plaintiff's which was "company-wide" in its scope should be mooted, since she now had no need  
19 for information which could establish a "public-wide" impact of any of Defendants' actions.

20 The Court finds (as Defendants have conceded) that the argument was improperly raised  
21 by means of Defendants' "supplemental statement" -- the FRCP makes no allowance for such a  
22 pleading. At the very least, Defendants should have requested permission to file the statement.

1 Nevertheless, as the issue has now been raised and briefed by both sides, the Court will proceed  
2 to rule on it by denying Defendants' request.

3 First, as indicated above and discussed in greater detail below, the Court is reinstating  
4 Plaintiff's CPA claim. This entitles Plaintiff to seek discovery on the "public interest" element  
5 of that claim relevant to the impact of Defendants' policies and practices on their customers  
6 within Washington State.

7 Second, even had the CPA claim been dismissed, it would still be incorrect to state that  
8 Plaintiff has no need for customer information that could lead to the discovery of a "pattern or  
9 practice" of malfeasance on Defendants' part. The Court agrees that "to prove fraudulent intent,  
10 retaliation and systematic and deliberate practice, discovery into how many times the practice  
11 has been employed necessarily is relevant." Mtn to Strike, p. 2. Proof of scienter required for  
12 establishing fraud alone can support the production of information related to company-wide  
13 practices.

#### 14 15 Motion for Sanctions

16 Following entry of a protective order, Defendants provided Plaintiff with 67 pages of  
17 Bates-stamped material (Dkt. No. 54-4) – although no narrative was provided, the material  
18 appeared to be the transaction record for Plaintiff's mortgage account. The documents were  
19 redacted and accompanied by a privilege log justifying every redaction on the basis that "[n]otes  
20 reflect attorney-client communication regarding litigation." Dkt. No. 54-6. An unredacted copy  
21 of the document was inadvertently provided to Plaintiff's expert who contacted Plaintiff's  
22 counsel with that information. Although Plaintiff's counsel returned the unredacted version to  
23 defense counsel, concerns had been raised about the redactions and Plaintiff's counsel requested  
24

1 that Defendants submit the redacted and unredacted copies to the Court for *in camera* review.  
2 Defendants declined that request and instead delivered an unredacted copy of the materials to  
3 Plaintiff, accompanied by a declaration that the documents were still subject to claims of  
4 protection and privilege. Dkt. No. 54-12.

5 Defendants argue that all the redacted material represents good faith claims of attorney-  
6 client privilege and/or work product. The Ninth Circuit defines the elements of attorney-client  
7 privilege as follows:

- 8 1. Where legal advice of any kind if sought
- 9 2. From a professional legal advisor in his or her capacity as such
- 10 3. The communications relating to that purpose
- 11 4. Made in confidence
- 12 5. By the client
- 13 6. Are, at that instance, permanently protected
- 14 7. From disclosure by the client or by the legal advisor
- 15 8. Unless the privilege is waived.

16 In re: Fischel, 557 F.2d 209, 211 (9th Cir. 1977). Work-product protection applies to  
17 “documents and tangible things prepared in anticipation of litigation or for trial” by or on behalf  
18 of a party, and protects materials prepared for litigation that reflect the thought process of  
19 counsel. FRCP 26(b)(3); *see Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

20 The Court fails to see how either of these privileges applies to the material which was  
21 redacted by Defendants’ counsel from the documents at issue.

22 In some of the redacted instances, there is no indication at all that the redacted activity  
23 (e.g., “REQUEST: REVERSE FUNDS AND REPOST WITH THE CORRECT EFF DATES” at  
24 pp. 722, 726) was done at the request of Defendants’ counsel or that Defendants’ counsel was  
notified. Some of the redacted material simply lists the name of a BANA employee (e.g.,  
PATRICIA BUCHANAN at pp. 731, 733, 734). Even where the redaction indicates the  
possibility of attorney involvement (e.g., “RECEIVED EMAIL FROM BAC LEGAL RE

1 MISAPPLIED PYMTS BEGINNING 03/30/10. SENT REPLY ADV WILL RESEARCH  
2 LOAN HISTORY AND HAVE ANY PYMTS MISAPPLIED CORRECTED WILL REPLY TO  
3 LEGAL AFTER FURTHER RESERARCH OF PYMTS” at p. 718; ‘LOAN HISTORY WAS  
4 REQUESTED TO BE FAXED WITH DATES FROM 07/2010 TO 11/20/11... Attention1:  
5 PATRICIA K BUCHANAN Attention 2: JAMIE WALK (*BANA attorney*)” at p. 723), there is  
6 no indication that the activity occurred because “legal advice was sought by the client” or that  
7 the redaction was protecting any “documents prepared in anticipation of litigation.” “Work  
8 product” does not apply to notations made in Plaintiff’s loan account that a request was  
9 communicated from an attorney to an employee of a client.

10 The notations in the loan account that do not reflect any attorney involvement are clearly  
11 not protected. Nor does the Court find that the notations that make mention of legal counsel are  
12 protected because they do not represent instances where legal advice was being sought by the  
13 client; they represent either notations of a communication where research was requested or the  
14 results of proactive research requested by the attorneys themselves.

15 All of which leads to the conclusion that this material was improperly redacted, and the  
16 effect of the redaction would have been to hamper Plaintiff’s efforts to discover who was  
17 involved in correcting the misapplication<sup>1</sup> of her principal prepayments. However, having met  
18 with the parties and placed the case back on a course which will (again, hopefully) avoid these  
19 sorts of misunderstandings for the remainder of the litigation, the Court is not inclined to impose  
20 sanctions and will simply let this ruling stand as a caution to the parties to utilize their privileges  
21 and protections wisely and with restraint.

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22  
23 <sup>1</sup> Plaintiff claims that one effect of the redactions is to “conceal” Defendants’ awareness that her principal  
24 prepayments had been misapplied. Defendants note, correctly, that there is plenty of mention in the originally  
unredacted portions of the document that the payments had been misapplied; e.g., Dkt. Nos. 54-5 and 54-12 at p.  
719.

1 Motion for Extension of Discovery

2 It was agreed between the Court and the parties that additional time would be needed for  
3 discovery and dispositive motions in light of the current state of discovery, so Plaintiff's motion  
4 in this regard will be granted. The parties will submit a proposal for a revised case schedule.

5  
6 Motion for Reconsideration

7 Plaintiff seeks reconsideration of the dismissal of Count VII, her CPA claim. That claim  
8 was dismissed on the grounds that Plaintiff had done nothing more than argue that the practices  
9 of which she complained had the "capacity" to impact the public, which was found to be  
10 inadequate to satisfy the "public interest" requirement of a CPA violation. Dkt. No. 50, Order, p.  
11 13. Plaintiff argues that the Court improperly analyzed the "public interest" element and the  
12 Court agrees.

13 A close reading of the leading CPA case, Hangman Ridge, reveals that the "likelihood"  
14 that others will be injured in a similar fashion is sufficient to support the "public interest"  
15 element of the a CPA cause of action:

16 [I]t is the likelihood that additional plaintiffs have been or will be injured in  
17 exactly the same fashion that changes a factual pattern from a private dispute to  
18 one that affects the public interest. *[citation omitted]* Factors indicating public  
19 interest in this context include: (1) Were the alleged acts committed in the course  
20 of defendant's business? (2) Did defendant advertise to the public in general? (3)  
Did defendant actively solicit this particular plaintiff, indicating potential  
solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining  
positions? As with the factors applied to essentially consumer transactions, not  
one of these factors is dispositive, nor is it necessary that all be present.

21 Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 790-791  
22 (1986).

23 The factors enumerated by the Hangman Ridge court for the purpose of establishing the  
24 "likelihood that additional plaintiffs have been or will be injured in exactly the same fashion"



1 emphasize that, from a standpoint of proper pleading, Plaintiff need only allege circumstances  
2 which are at best tangentially related to the actual impact on consumers other than herself (e.g.,  
3 her mortgage was part of Defendants' business, Defendants advertise to the general public, she  
4 was actively solicited as a customer by Defendants and did not bargain with them from a position  
5 of equivalent power). Plaintiff has plead a sufficient number of these factors to satisfy the  
6 Hangman Ridge test for "*likelihood* of public impact" and it was error to dismiss her claim for  
7 failure to plead that impact with more precision.

8         The fact that at least a portion of Plaintiff's claims against Defendants springs from  
9 allegedly boilerplate language in her mortgage documents lends further support to her argument  
10 that the practices of which she complains have the potential to impact the wider public and is  
11 sufficient to defeat (at this early stage) Defendants' argument that she has not plead specific facts  
12 suggesting a generalized pattern of conduct. It is entirely plausible that routine language utilized  
13 in documents by institutions as large as BANA has a real and substantial potential for impacting  
14 a wider public if there is an actionable gap between what the institution is representing as its  
15 practice and what it is actually practicing. Plaintiff's CPA claim may yet be vulnerable, post-  
16 discovery, to an attack on summary judgment grounds, but she has plead the claim adequately  
17 enough to proceed to discovery.

18         Plaintiff also argues that she has plead violations of several state statutes which were  
19 created to protect the public interest and that a finding of violation of those statutes would  
20 constitute a *per se* violation of the "public interest" element of the CPA. Hangman Ridge makes  
21 it clear that it is a little more complicated than that:

1 [T]he public interest element may be satisfied per se. The per se method requires  
2 a showing that a statute has been violated which contains a specific legislative  
3 declaration of public interest impact. In Haner v. Quincy Farm Chems., Inc.,  
*supra*, 97 Wash. at 762, 649 P.2d 828, we stated the rule, which has continuing  
4 validity:

[U]nless there is a ‘specific legislative declaration’ of a public interest, the  
public interest requirement ... is not per se satisfied ...

5 Id. at 791.

6 Plaintiff specifically argues that the Consumer Loan Act claim which the Court upheld  
7 operates as a *per se* qualifier for CPA claims. But the statute itself reads that “[a]ny violation of  
8 this chapter... is an unfair and deceptive act or practice and unfair method of competition in the  
9 conduct of trade or commerce in violation of RCW 19.86.020 [CPA].” RCW 31.04.208. The  
10 “public interest” element is specifically excluded from “*per se* violation” status in this statute,  
11 and on that basis the Court does not accept that portion of Plaintiff’s argument. Nevertheless, the  
12 CPA claim will be reinstated and permitted to proceed.

#### 13 14 **Conclusion**

15 Plaintiff’s motion to compel will be granted in part and the parties are to proceed forward  
16 with discovery utilizing the guidelines worked out at the status conference. Plaintiff’s motion to  
17 strike Defendants’ supplemental statement will be denied, but Plaintiff will be permitted to  
18 proceed forward with her discovery requests for certain information from the Defendants’  
19 customer-wide databases.

20 While the Court agrees that Defendants provided Plaintiff with improperly-redacted  
21 materials, her motion for sanctions will be denied.

22 Plaintiff’s motion for an extension of discovery will be granted and incorporated into the  
23 revised case schedule which the parties will file with the Court by June 21, 2012.

1 Finally, Plaintiff's motion for reconsideration of the dismissal of the Consumer  
2 Protection Act claim will be granted, and the claim alleging a violation of the Washington  
3 Consumer Protection Act is reinstated.

4 The clerk is ordered to provide copies of this order to all counsel.

5 Dated June 21, 2012.

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9 Marsha J. Pechman  
10 United States District Judge  
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